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No. 03-898

SUPREME COURT, U.S.
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In The
Supreme Court of the United States

MIGUEL G. ORTIZ VELEZ, Mayor of the Municipality of Sabana Grande, MUNICIPALITY OF SABANA GRANDE,
Petitioners,

v.

SANTOS RIVERA-TORRES, DAISY NAZARIO-SANTANA; CONJUGAL PARTNERSHIP RIVERA-NAZARIO; YASIRA RIVERA-NAZARIO, MINOR; ZAHIRA RIVERA-NAZARIO, MINOR,
Respondents,

On opposition for a Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

From the Federal District Court of San Juan, Puerto Rico No. 01-1244 (JAF) and First Circuit Court of Appeals No. 02-2539; 03-1074

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March 2nd, 2004

QUESTION PRESENTED

1. Whether the district court retained jurisdiction over the case while appellants' interlocutory Forsyth appeal was pending before the Court of Appeals absent an Apostle certification that the appeal was frivolous.

2. Whether the First Circuit properly held that the district court's pretrial denial of qualified immunity based on the existence of an unresolved controversy of fact regarding defendant's motivation is an unappealable order because the state of mind element of the underlying constitutional claim merges with the qualified immunity inquiry.

3. Whether a reasonable officer in the Mayor's position would have understood that the decision to defer acceptance of a letter of resignation pending a personnel investigation pursuant to state law would violate the employee's clearly established rights.

4. Whether the deferred acceptance of a public employee's letter of voluntary resignation pending a personnel investigation into unauthorized absences pursuant to state law constitutes a municipal law, policy or custom in violation of that employee's constitutional rights.

5. Did the First Circuit Court of Appeals correctly affirm that jury below found that Petitioners engaged in flagrant political discrimination against Respondent Santos Rivera Torres?

6. Did the First Circuit Court of Appeals committed an error when confirm the verdict by the courts below, when the jury's findings are not attacked in the Petition for a Writ of Certiorari?

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INTRODUCTION

The jury below found that Petitioners engaged in flagrant political discrimination against Respondent Santos Rivera Torres, and the First Circuit Court of Appeals affirmed that verdict. No errors were committed by the courts below, and the jury's findings are not attacked in the Petition for a Writ of Certiorari. As discussed below, the legal contentions in that Petition are wholly without merit, and not such writ should be granted.

Before delving into the substance of Petitioners' erroneous arguments and misrepresentations, it should be noted that, hidden underneath Petitioners' certiorari request to this Court, is their counsel's attempt to cover-up their faults during the trial proceedings.[1] To this respect, the First Circuit Panel commented on circumstances not indicated in Petitioner's submission to this Court:

> [W]e must note that the circumstances surrounding the defendants' *Forsyth* appeal betray its frivolousness. The district court's order of December 6 denying Ortiz's motion to stay the proceedings recounts that after the defendants' motion for summary judgment was denied on November 26, 2002, **counsel for defendants failed to appear in court on December 2, the day the trial was scheduled to begin. Defendants insisted that they were unable to proceed because Johanna M. Emmanuelli-Huertas, the counsel of record for defendants, was simultaneously involved in another trial. The court rejected this excuse, sanctioned Emmanuelli's law firm, and rescheduled the trial for December 3.** Later that day,

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[1] Petitioners also tried to cover-up each attempt to justify the deceitful termination of a 20-year-career municipal employee without due process, because such attempts backfired before the jury.

> Ortiz filed his notice of appeal, and immediately thereafter moved to stay the proceedings in the district court, asserting to the judge that "this Honorable Court lacks subject matter jurisdiction to submit co-defendant Ortiz-Velez to the rigors of trial." **The timing and haste of the defendants' notice of appeal reveals its intended purpose -- to cloak a request for postponement in *Forsyth* interlocutory raiments**. *See* Apostol, 870 F.2d at 1338-39 ("Defendants may take *Forsyth* appeals for tactical as well as strategic reasons: disappointed by the denial of a continuance, they may help themselves to a postponement by lodging a notice of appeal."). (Emphasis supplied.)

Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 97-98 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 57a-58a. Thus, despite a scheduling order entered months before the trial date, Petitioners' counsel (a 15-lawyer firm) simply opted not to appear for the first day set for trial. To save face and delay, first the trial, and then the implementation of the jury's verdict for Respondents, Petitioners' counsel have raised frivolous appeals all the way to this Court.

STATEMENT ON THE FACTS

Petitioners' exposition of the facts pertaining to the political discrimination they perpetrated upon Respondent Santos Rivera Torres is shallow, self-serving, and misleading. Respondents submit that a proper statement of the facts as determined by the jury below is found in the First Circuit Panel's holding, cited *verbatim* and unedited, as follows:

1. In 1980, Rivera was hired by the mayor of Sabana Grande to work in various capacities at the municipal gym. Plaintiff's duties included training boxers and weight lifters, teaching self-defense classes for children, and organizing weight lifting, boxing, gymnastics, and karate competitions at

locations around Sabana Grande. Most municipal jobs in Puerto Rico are sub-classified as "career positions" (akin to civil service jobs) or "trust positions" (political appointments). Municipal employees are similarly designated "career" or "trust" employees. At all times, Rivera was a career employee, and his job was designated a career position. In 1992, twelve years after plaintiff was hired, the incumbent mayor promoted him to "be in charge of the gymnasium." Although this managerial post was originally a "trust position," the municipality reclassified it as a career job to facilitate plaintiff's promotion.

2. At the time of the promotion, Rivera was a member of the Popular Democratic Party ("PDP"), though his allegiances were gradually shifting to the New Progressive Party ("NPP"). Over the next six years, from 1992 to 1998, Rivera's tenure as manager of the municipal gym was uneventful, and the record indicates that he received only positive employment evaluations. In December 1998, plaintiff formally joined the NPP, and local party leaders asked him to run as the NPP candidate for mayor of Sabana Grande. One week later, plaintiff publicly accepted the party's mayoral nomination at an NPP "plebiscite" (caucus).

3. Rivera's candidacy created a potentially awkward work environment. His opponent in the mayoral election was incumbent mayor [Petitioner] Miguel Ortiz Velez, who also happened to be plaintiff's boss by virtue of being mayor. Rivera testified at trial that his relationship with Ortiz changed dramatically after he announced his candidacy. That month, after returning from a three-week vacation, plaintiff discovered that the telephone had been removed from his office in the gymnasium. Rivera also learned that the mayor was requesting daily reports on his work habits from other coworkers stationed at the gym. In March 1999, the mayor observed Rivera outside his "area" during working hours, and

ordered his secretary to make notations on plaintiff's time card documenting his absence from work. When plaintiff confronted the vice-mayor of Sabana Grande over the incident, he received a thirty-day suspension for "being disrespectful to the vice-mayor." Rivera appealed this suspension to the Commonwealth's Board of Appeals for the Personnel Administration System ("JASAP"), which reversed his suspension and awarded Rivera thirty days' back pay. The Board's decision was affirmed on appeal to the Commonwealth's Court of Appeals, and the Puerto Rico Supreme Court denied certiorari.

4. In the aftermath of the JASAP proceedings, Rivera continued to experience harassment at work. The locks on the gym were changed to inhibit his access, and on one occasion Rivera found a stack of his personal and office documents torn up next to a trash can near his office. He was stripped of authority to direct the activities of subordinates at the gym, and he had several prolonged arguments with Ortiz at the gymnasium. On one occasion, the mayor ordered him to complete maintenance tasks that were not within the scope of his duties. The defendants did not seriously dispute these incidents at trial.

5. In May 2000, Rivera sought and received an offer of state-level employment at the Commonwealth Department of Sports and Recreation in nearby Mayagüez. At the time, the head of the Sport Administration Department was Eric Labrador, a fellow member of the NPP. Because Puerto Rico law prohibits individuals from simultaneously holding state and municipal-level employment, Rivera petitioned the municipality for a transfer. However, Mayor Ortiz refused to approve Rivera's transfer. Rivera testified that the mayor's secretary informed him that "the mayor would not sign unimportant papers."

6. Rivera was anxious to accept the state-level position before the November 2000 elections, anticipating that the employment offer would be rescinded if a PDP administration were elected into office. Thus, on June 5, 2000, Rivera submitted an irrevocable letter of resignation to the municipality. The consequences of resigning in lieu of obtaining a transfer were severe. Plaintiff stood to sacrifice the twenty years of seniority he had accumulated since 1980 for salary and benefit purposes. However, even this initiative proved unavailing when Ortiz refused to accept Rivera's resignation, citing an ongoing investigation into Rivera's excessive absenteeism over the previous five months. Mayor Ortiz testified at trial that under Puerto Rico law, a municipality loses the authority to discipline a municipal employee once that employee has been transferred to a state agency. Hence, it was critical to delay plaintiff's transfer request until the administrative investigation into his absenteeism had been resolved.

7. Rivera insisted that his absences were due to work-related illnesses, and he instructed his doctor, Silva Cherena, to submit medical reports to the municipality documenting his symptoms. Indeed, Dr. Silva Cherena had sent plaintiff's medical information to the municipality on July 1, 2000. However, Mayor Ortiz's office claimed not to have received the doctor's letter until October 31, 2000. Two weeks later, Mayor Ortiz finally accepted Rivera's irrevocable resignation, nearly five-and-a-half months after it was tendered. In the intervening period, the NPP party had been voted out of key Commonwealth positions, and the job offer at the Commonwealth Department of Sports and Recreation was no longer available. Rivera was unable to find other work, and his family suffered significant financial and emotional hardship as a result.

Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 89-91 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 42a-45a. We must stress that the facts provided above (in language borrowed from the First Circuit Court of Appeals' holding) were determined by the jury, validated by the District Court Judge, and corroborated by the First Circuit Court of Appeals' review of the record.[2]

ARGUMENT

Respondents had to contend, through the trial phase and appeal before the First Circuit, with a plethora of baseless arguments by Petitioners; their strategy has been akin to throwing a bowl of spaghetti at a wall, in the wild hope that one strand will stick.[3] At this last appellate stage, Petitioners again raise frivolous arguments to delay the enforcement of the jury's verdict. Petitioners' first three arguments for the granting of certiorari stem from the same erroneous rationale that the Federal District Court lacked jurisdiction to proceed to trial. The fourth is an attempt to reargue, to this Court, the facts already determined by a jury.

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[2] In this Opposition, Respondents have attempted to point to each instance of misrepresentation in the Petition for Certiorari. However, given the comparative size of the resources of the parties (Petitioners are backed by the resources of the Commonwealth of Puerto Rico, and are represented by a 15-lawyer firm; while the undersigning is a solo practitioner), Respondents submit that any factual representation in the Petition for Writ of Certiorari that is inconsistent with the jury's findings (as summarized by the First Circuit Court -- cited above) should be disregarded by this Supreme Court.

[3] Petitioners included in their Reply to the First Circuit Court of Appeals the following statement: "Defendants' [Petitioners'] evidence presented in the Jury Trial was the same as described in their Dispositive Motions." But as much as these "justifications" for adverse employment actions were absurd in writing, they were more so when presented through testimony and documentary evidence. The evidence presented by Respondents was consistent, truthful, clear, and squarely substantiated at the trial. See Plaintiff's Undisputed Facts on, Docket-70, A-34B - Page 667 of the Joint Appendix. In contract, Petitioners' excuses and justifications were totally absurd and unbelievable.

None of these arguments come close to meriting a Writ of Certiorari. We address each such argument in turn.

I. RESPONSE TO PETITIONERS' CONTENTION ABOUT THE AVAILABILITY OF APPELLATE JURISDICTION WHEN THE DISTRICT COURT DENIES A PRETRIAL ASSERTION OF QUALIFIED IMMUNITY ON A PERCEIVED ISSUE OF FACT

Petitioners' Forsyth and Apostol arguments are misplaced, as the First Circuit Court was correct in finding that Petitioners' notice of appeal was frivolous. The District Court never lost jurisdiction over the instant case and/or to conduct the trial proceedings because: (i) Petitioners did not adequately explain before the Court of Appeals why the denial of their motion for summary judgment was immediately appealable; (ii) the appeal was patently meritless; and (iii) it constituted a transparently frivolous attempt to impede the progress of the case.[4] At this point of departure, it is useful to note the procedural developments below, as described by the First Circuit Panel:[5]

> [...] On November 26, 2002, the district court initially entered an Opinion and Order denying defendants' pre-trial

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[4] In their heading for the corresponding section in the Petition, Petitioners summarize their first argument for certiorari as the need to resolve a conflict between the circuits as to the availability of appellate jurisdiction where the district court denies a pretrial assertion of qualified immunity on the basis of a perceived issue of fact. Petition, at 5. However, the basis for this argument gets lost in the exposition. Thus, we cover what we perceive are Petitioner's arguments in this section.

[5] The First Circuit Court decided not to stay the commencing jury trial. See Order dated December 2, 2002, District Court Docket-80, Joint Appendix for the 1st Circuit Ex-40, Page-709).

request for qualified immunity. On December 2, defendants responded by filing a notice of appeal from the denial of immunity and moving the district court to stay the proceedings pending the resolution of the appeal. Immediately thereafter they petitioned this court for a stay of the district court [trial] proceedings. Without the benefit of an order from the district court denying the motion to stay, we denied the requested stay in a summary order issued that same day:

> "The motion to stay trial is denied. In denying appellants' motion for summary judgment based on qualified immunity, the district court stated that 'Ortiz's motivation for denying and deferring Plaintiff's resignation is an unresolved issue of material fact.' As appellants have not adequately explained why the denial is immediately appealable, see Stella v. Kelley, 63 F.3d 71, 74 (1st Cir. 1995) ("a district court's pretrial rejection of a qualified immunity defense is not immediately appealable to the extent that it turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact"), the motion for stay is denied."

On December 3, 2002, the district court began the trial. Meanwhile, defendants had filed a motion for reconsideration of our December 2, 2002 order denying the stay. By order dated December 6, 2002, we rejected the defendants' motion for reconsideration:

> "To the extent that defendant is asking this court to immediately stay any further trial, the request is denied. We request the district court, however, to expressly act on defendant's motion for stay. See Hegarty v. Somerset County, 25 F.3d 17, 18 (1st Cir. 1994); Chuman v. Wright, 960 F.2d 104, 105 (9th Cir. 1992) ('Should the district court find that the defendants' claim of qualified immunity is frivolous or has been waived, the district court

may certify, in writing, that defendants have forfeited their right to pretrial appeal, and may proceed with trial'). Any renewed request for a stay filed in the court of appeals must be accompanied by sufficient portions of the record to allow for intelligent review."

In the interim, however, the district court had nearly completed the trial. On December 6, after entertaining closing arguments and issuing instructions to the jury, the district court denied the defendants' motion for stay in an order dated that day:[6]

"[O]ur denial of summary judgment turned on an unresolved issue of fact in a clearly established legal scenario strongly indicative of improper political discrimination. Under these

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[6] It is important to note that, Petitioners have, once and again, made reference to isolated excerpts taken out of context from the District Court's Opinion and Order, trying to convey the idea, first to the First Circuit Court of Appeals, and now to this Supreme Court, that the qualified immunity defense was denied at the summary judgment stage solely "because the defendant's actual motive is unresolved, but no other factual dispute remains." See Petition, at 8, 12, and 15. That representation is untrue, as the District Court identified significant factual issues that precluded summary judgment. This Court will confirm the inaccuracy -- not to say the outright falsity -- of such a statement just by a cursory glance at the District Court's Opinion and Order, which we reproduce at length for the sake of accuracy:

"Defendants maintain that they have satisfied this burden because they were investigating Defendant for frequent absences from work. Defendant Ortiz submits an affidavit stating that by the time he received the request for the transfer in April 2000, his office was investigating Plaintiff's poor attendance record. Defendant Municipality's Human Resources Director, Migdalia Rodríguez, also attests that she began an investigation into Plaintiff Rivera Torres' excessive absences in April 2000. However, neither Ortiz nor Rodríguez actually attests that this investigation was the reason they denied the transfer. Furthermore, Defendants have not submitted any evidence that a fledgling investigation into an employee's record of absenteeism is a sufficient basis to deny a transfer or that this was normal procedure. Without evidence to this effect, we necessarily find that Defendants have not satisfied their burden."

> circumstances, an appeal of an unresolved factual question is baseless and is not immediately appealable. Therefore, we necessarily certify that Defendant's appeal is frivolous under the present circumstances." *Rivera-Torres v. Ortiz-Velez,* Civil No. 01-1244 at 5-6 (D.P.R. December 6, 2002).

Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 89-94-95 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 51a-53a.

Faced with this background, Petitioners attempt to ground their argument on an interpretation of the Apostol certification process for Forsyth appeals. However, the First Circuit Panel below correctly found it unnecessary to engage in such an analysis, finding dispositive that the notice of appeal was frivolous.[7] As that Circuit Court Panel indicated:[8]

> We have never adopted the Apostol certification procedure in this circuit. Although appellants urge us

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[7] Petitioners rest on that the District Court "fail[ed] to certify frivolousness before proceeding to trial." The fact is that the petitioners' appeal was filed on December 2, 2002, but the trial was rescheduled to the next day (because Petitioners' counsel did not show up for trial on December 2), when their appeal had already being rejected by the Court of Appeals. In addition, the grounds for Petitioners' appeal were insufficient, as were those submitted in their motion for summary judgment motion (which was rejected by the District Court). Most importantly, while the Petitioners requested the First Circuit to stay the trial proceedings on the basis of the appeal submitted, the First Circuit Court also denied such a motion through the Order issued on December 2, 2002. Thus, the First Circuit Court at that point found the district court to have jurisdiction to continue with trial proceedings. Therefore, there is no basis to find that the District court lacked jurisdiction the following day.

[8] Respondents' counsel apologizes to the Court for the long citations to the decision of the First Circuit Court below, but such decision aptly dealt with Petitioner's arguments before this Court.

to do so here in the hopes of adding fuel to their trial nullity argument, we decline their invitation. Whatever the merits of the certification procedure may be, its primary innovation-- permitting the district court to reclaim jurisdiction from the court of appeals in the wake of a Forsyth appeal--has no relevance to this case. The defendants' notice of appeal was patently meritless, and therefore failed to divest the district court of jurisdiction in the first instance. As we observed in United States v. Brooks, 145 F.3d 446 (1st Cir. 1998):

> "[l]ike most rules, the rule that either the trial or the appellate court--but not both--may have jurisdiction over a case at any given point in time admits of some exceptions. Thus, a district court can proceed, notwithstanding the filing of an appeal, if the notice of appeal is defective in some substantial and easily discernible way (if, for example, it is based on an unappealable order) or if it otherwise constitutes a transparently frivolous attempt to impede the progress of the case." Id. at 456. In this case, the defendants' interlocutory appeal was based on an unappealable order. As we ruled in Stella:[9]
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> "a district court's pretrial rejection of a qualified immunity defense is not immediately appealable to the extent that it turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact ... in such a situation, the movant must await the entry of final judgment before appealing the adverse ruling."
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> Stella, 63 F.3d at 74 (emphasis added). This principle, which we reiterated in our initial order

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[9] Stella v. Kelly, 63 F.3d 71, 74 (1st Cir. 1993).

> denying defendants' request for stay, rendered the district court's denial of qualified immunity unappealable. Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 96-98 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 54a-57a.

Petitioners' notice of appeal to the First Circuit was frivolous and thus never divested the District Court of jurisdiction. But, even if such appeal had been based on other legal grounds that could have been capable of depriving the District Court of jurisdiction, Petitioners' interpretation of the operation of the Forsyth and Apostol holdings is erroneous, and thus do not support a writ of certiorari from this Court.

In Griggs v. Provident Consumer Discount Co., 103 S.Ct. 400 (1982), this Court established that, upon the notice of appeal, jurisdiction is conferred on the appellate court, and the district court is deprived of jurisdiction over "those aspects of the case." Petition, at 8 (citing Griggs, 459 U.S. at 511). However, as the Circuit Court below pointed out, "[c]ourts have carved out a few narrow exceptions to this rule, such as where the defendant frivolously appeals or takes an interlocutory appeal from a non-appealable order." Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 89-91 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 50a (citing U.S. v. Defries, 129 F.3d 1293 (D.C. Cir. 1997)). These exceptions mentioned in Defries have found a useful place in the jurisprudence of several circuits when dealing with frivolous Forsyth appeals. In Apostol v. Gallion, 870 F.2d 1335 (7th Cir. 1989), the Seventh Circuit was correct in noting that "although [Forsyth] protects the interests of the defendants claiming qualified immunity, it may injure the legitimate interests of other litigants and the judicial system... Defendants may seek to stall because they gain from delay at plaintiffs' expense, an incentive yielding

unjustified appeals. Defendants may take [...] appeals for tactical as well as strategic reasons: disappointed by the denial of a continuance, they may help themselves to a postponement by lodging a notice of appeal."[10] With regard to qualified immunity rulings, the "notice of appeal may be so baseless that it does not invoke appellate jurisdiction" even when filed. Id., at 1339. Thus, the "certification procedure" was developed to allow the district courts to prevent such frivolous appeals from achieving these improper purposes: "a district court may certify to the court of appeals that the appeal is frivolous and [retrieve jurisdiction to] get on with the trial." Id. This certification process has become indispensable in qualified immunity cases as adopted by the Sixth, Ninth, and Tenth Circuits. See Yates v. City of Cleveland, 941 F.2d 444, 448-49 (6th Cir. 1991); Chuman v. Wright, 960 F.2d 104, 105 (9th Cir. 1992); and Stewart v. Donges, 915 F.2d 572, 577 (10th Cir. 1990).[11] And, while the Supreme Court has not formally

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[10] Even if Respondents were correct in their assertion that there exists a conflict between circuit's courts as to these legal precepts, the present case is not the appropriate instance for this High Court to impart instruction. The adage is that bad cases make bad law; and this is a very bad case for this Court to employ. As Petitioners admit in their Petition, "[c]ourts have been wary of the potential for defendant officials to abuse the Forsyth interlocutory review mechanism by customarily seeking appellate review of the pretrial denial of qualified immunity, even in patently unmeritorious cases, with the sole purpose of stalling litigation." Were this case to merit certiorari, it would be to affirm the Circuit Court's decision, but, all things considered, the nuances of the trial proceedings, aggravated by Petitioner's own faults, make this case a bad selection as the basis for this Court to establish a rule of law. Consequently, certiorari should be denied.

[11] In trying to provide support for their arguments, Petitioners made reference to Stewart v. Donges, 915 F.2d 572 (10th Cir. 1990), as being analogous to the present case. That holding is from the 10th Circuit, and was therefore not controlling over the courts below. More important to this Supreme Court is that the Stewart holding is in fact materially distinguishable from the present case, since in Stewart the appellate court had not denied the stay of proceedings below, and did not instruct the district court to make a determination as to the certification. In the present case, the Court of Appeals denied the request

validated the certification process instituted, it has recognized its purpose and value: "This [certification] practice, which has been embraced by several Circuits, enables the district court to retain jurisdiction pending summary disposition of the appeal, and thereby minimizes the disruption of the ongoing proceedings." Behrens v. Pelletier, 516 U.S. 299, 310-11 (1996). Therefore, the certification process has been adopted by several circuits to allow the proceedings to continue their course in the face of a frivolous appeal; and such an appeal was filed by Petitioners in this case. As the Circuit Court below shrewdly identified, this *Forsyth* appeal fell under that category: a desperate attempt to postpone the trial because Petitioners' counsel failed to appear for the first day of trial and was subsequently unprepared (not that better preparation could have helped Petitioners' case). Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 89-91 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 42a-45a.

Lastly, Petitioners suggest that "firm guidelines as to the certification proceedings" should be set by this Court. Maybe so, but this is not the case for such conventions, as no error was committed by the courts below. The District Court conducted the trial with full jurisdiction, and complied with the instructions issued by the First Circuit Court regarding jurisdiction. It should be considered, above all, that, even if Petitioners were correct in their arguments (which we dispute), it would be fundamentally unfair for this Honorable Supreme Court to decree now that the District Court lacked jurisdiction, specially given the Circuit Court's Orders of December 2 and 5. Also, considering the judicial resources

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for a stay of trial proceedings (thus recognizing the trial court's jurisdiction to carry on with trial), and instructed the District Court to make a determination as to the certification (thus indicating that no error had been committed).

spent on trial, and the resolution of the factual controversies by way of a jury verdict, it makes no sense for this Court to find that the District Court lacked jurisdiction, especially since the Circuit Court denied the stay of proceedings for the same reason the District Court denied Petitioners' Summary Judgment Motion: "a district court's pretrial rejection of a qualified immunity defense is not immediately appealable to the extent that it turns on either an issue of fact or an issue perceived by the trial court to be an issue of fact."

II. RESPONSE TO PETITIONERS' CONTENTION ABOUT THE ROLE OF SUBJECTIVE INTENT IN QUALIFIED IMMUNITY ANALYSIS

The Petition for Certiorari states that the "merits of the qualified immunity pleas of Petitioner Ortiz have never been heard, neither by the lower nor the intermediate tribunals. The sole reason for this is that the district court found that there was a factual dispute as to whether defendant's subjective motivations were moved by partisan politics." See Petition, at 15. These assertions completely ignore the fact that a trial before a jury was held and what the District Court determined, on page 21 of its Opinion and Order, issued on November 26, 2002, that: "Defendants have not submitted any evidence that a fledgling investigation into an employee's record of absenteeism is a sufficient basis to deny a transfer or that this was normal procedure." See Petition, at 17a.

A fortiori, petitioners had ample opportunity to present their qualified immunity pleas, which were unambiguously and repeatedly rejected. Likewise, the District Court was also correct as a matter of law in denying the qualified immunity defense at the summary judgment stage as we shall demonstrate in the foregoing discussion.

The First Circuit Court dismissed this argument from Petitioners, indicating that:

> To avoid the application of this principle, appellants now lamely defend the legitimacy of their interlocutory appeal by arguing that the district court's qualified immunity determination turned on the legal question of whether a municipal officer's subjective intent is relevant to the qualified immunity analysis, and insisting that the court "improperly considered the element of subjective intent as part of the qualified immunity inquiry." Superficially, Ortiz draws support for his opposition from the Supreme Court's decision in Crawford-El v. Britton, 523 U.S. 574, 118 S.Ct. 1584, 140 L.Ed. 2d 759 (1998), and our post-Crawford-El jurisprudence. See Tower v. Leslie- Brown, 326 F.3d 290, 296 (1st Cir. 2003); Abreu-Guzman v. Ford, 241 F.3d 69, 73 (1st Cir. 2001) ("Evidence concerning the officer's subjective intent is simply irrelevant to a qualified immunity defense."); Sheehy v. Town of Plymouth, 191 F.3d 15, 19 (1st Cir. 1999). To illustrate the flaw in Ortiz's argument, one must differentiate between constitutional violations that are strictly a product of the perpetrator's actions, and offenses where the perpetrator's subjective intent is an essential element of the violation. For example, an individual's Fourth Amendment rights are violated by the very fact that a police officer arrests him without probable cause, regardless of the officer's subjective intentions at the time of the arrest. See [Abreu-Guzman v. Ford, 241 F.3d 69, 73 (1st Cit. 2001). Similarly, a suspect who is interrogated by the police without being advised of his right to counsel suffers a Fifth Amendment injury regardless of the questioning officer's intent or motives. In these situations, the rule of Crawford-El sensibly excludes evidence of the officer's intent from the qualified immunity analysis.

On the other hand, subjective intent is an essential element of political discrimination. We have previously observed that:

> "[w]hen a former government employee brings a First Amendment suit against his employer for taking an adverse employment action against him on the basis of his speech, the premier precedent is Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 97 S.Ct. 568, 50 L.Ed. 2d 471 (1977). Under the Mt. Healthy paradigm, the plaintiff must show both that his speech was constitutionally protected, **and that it was a `substantial' or `motivating' factor for the adverse action taken against him**."
>
> Stella, 63 F.3d at 74-75 (emphasis added). In other words, an employee's First Amendment right to be free from political discrimination is violated when the employer's adverse employment decision is motivated by the employee's political speech. Hence, the employer's subjective motive is an essential element of the constitutional violation itself, and cannot be divorced from the qualified immunity inquiry. Our previous decisions underscore the importance of the employer's subjective intent in political discrimination cases:
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> > "Harlow [v. Fitzgerald, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed. 2d 396 (1982)] does not rule out the need to inquire into the actual reasons behind an official's conduct when the official's state of mind is a necessary component of the constitutional violation he allegedly committed.... [T]he official's abnormal expertise in law, or his subjective, below par, lack of expertise, makes no difference. But determining whether defendant fired an employee for a discriminatory reason ... is an altogether different matter."

> Feliciano-Angulo v. Rivera-Cruz, 858 F.2d 40, 45 (1st Cir. 1988). In Acevedo-Garcia v. Vera-Monroig, 204 F.3d 1 (1st Cir. 2000), we similarly dismissed defendants' contention that subjective intent is irrelevant to qualified immunity, explaining that "[t]he plaintiffs allege that they were terminated because of their political affiliation, a constitutional claim that has no meaning absent the allegation of impermissible motivation." Id. at 11. Accordingly, the proffered legal basis for the defendants' Forsyth appeal is meritless, having been foreclosed by our prior decisions in Feliciano-Angulo and Acevedo-Garcia, see supra, properly cited by the district court in its order denying defendants' request for a stay, and characterizing the interlocutory appeal as frivolous.

Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 96-98 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 54a-57a.

Pursuant to First Circuit case law, determining whether qualified immunity is available to a particular defendant at a particular time requires a trifurcated inquiry. First is whether the plaintiff has alleged the violation of a constitutional right. If so, the next question is whether the contours of the right were sufficiently established at the time of the alleged violation. The final step is determining whether an objectively reasonable official would have believed that the action taken or omitted violated that right. Hatch v. Dept. of Children, Youth and their Families, 274 F.3d 12, 20 (1st Cir. 2001). That is, the threshold inquiry a court must undertake in a qualified immunity analysis is whether plaintiff's allegations, if true, establish a constitutional violation. Despite their participation in this

constitutionally impermissible conduct, the defendants may nevertheless be shielded from liability for civil damages if their actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Hope v. Pelzer, 536 U.S. 730, 746 (2002). Furthermore, as this Supreme Court explained in Hope, qualified immunity operates to ensure that, before they are subjected to suit, officers are on notice their conduct is unlawful, because for a constitutional right to be clearly established, its contours "must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, see Mitchell [v. Forsyth, 472 U.S. 511,] 535, n. 12; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Anderson v. Creighton, 483 U.S. 635, 640 (1987)." (Emphasis added).

The law applicable to the present case has reached "black letter" status. See, e.g., Rutan v. Republican Party of Illinois, 497 U.S. 62, 75 (1990) (holding that promotions, transfers, and recalls after layoffs based on political affiliation are examples of impermissible deprivations less harsh than dismissal, that nevertheless press state employees and applicants to conform their beliefs and associations to some state-selected orthodoxy) ("[T]he First Amendment . . . already protects state employees not only from patronage dismissals but also from 'even an act of retaliation as trivial as failing to hold a birthday party for a public employee . . . when intended to punish her for exercising her free speech rights.'" Id. at 76 n.8). See, also, Cleveland Board of Education v. Loudermill, 470 U.S. 532, 543 n.8, 545-546 (1985) ("[W]here there is an entitlement, a prior hearing facilitates the consideration of whether a permissible course

of action is also an appropriate one") ("It should be an initial check against mistaken decisions --essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action."). As this Court settled in Anderson, 483 U.S. at 640, "the very action in question has previously been held unlawful."

Accordingly, this is not a case of "mistaken judgment" for which Petitioners can escape liability. Because the law was clearly established at the time when Petitioners denied Respondent's request of transfer and subsequent resignation, with a discriminatory political animus and without a previous hearing, Petitioners are simply not entitled to qualified immunity. See Harlow, 457 U.S. at 819. Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, she should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action. El Día, Inc. v. Rosselló, 165 F.3d 106, 110 (1st Cir. 1999).

While the first two prongs of the qualified immunity analysis deal with abstract legal principles, the final step deals directly with the facts of the particular case. Hatch v. Dept. of Children, Youth, *supra*. The question here is whether Petitioner Ortiz Vélez had any legitimate reason, sufficient to deny Respondent's request of transfer and subsequent resignation without a previous hearing. As mentioned before, to that effect the District Court determined on page 21 of its Opinion and Order: "Defendants have not submitted any evidence that a fledgling investigation into an employee's record of absenteeism is a sufficient basis to deny a transfer or that this was normal procedure." Petition, at 17a. This Court's review of the record below will confirm that conclusion, and that should be the end of the road for

this argument. Still, *arguendo*, even if there might once have been a question regarding the constitutionality of this practice (which is not the case), the First Circuit precedents, as well as of the laws of the Commonwealth of Puerto Rico, certainly put a reasonable officer on notice that postponing indefinitely Respondent's request of transfer and his subsequent resignation, without a previous hearing under the circumstances alleged by him, was unlawful. In addition, the applicable Commonwealth regulations provided that the matters subject to Petitioner Ortiz Vélez consideration had to be determined in less than 15 days. See, Nazario Acosta v. Estado Libre Asociado, 2003 TSPR 116, Judgment Entered by the Supreme Court of Puerto Rico (without an Opinion) on June 30, 2003, at 549 (holding that, once the timeline for concluding the investigation and the subsequent filing of charges has expired, the government had two options; either it had to file charges in order for the employee to have the opportunity to be heard recognizing his due process rights; or, on the contrary, it had to declare the investigation as concluded; the government was held to have been negligent when it did not act in either of the ways described). Accordingly, the "fair and clear warning" provided by these legal enactments was sufficient to preclude the defense of qualified immunity at the summary judgment stage. Hope v. Pelzer, *supra*.

Thus, in order to decide the petitioners' summary judgment motion, the court faced a factual dispute as to whether Respondent was denied due process, and/or whether Petitioners' decisions and actions were in fact motivated by a discriminatory animus in response to Respondent Rivera Torres' exercise of his rights of free speech and association under the First Amendment of the Constitution of the United States of America. On the basis of the evidence presented, the jury found that, once Respondent Rivera Torres' became

a member of the NPP and a mayoral candidate; he suffered a rash of discriminatory behavior at the hands of his supervisors and municipal officers. Furthermore, this factual dispute is material because it shall determine whether there is a causal link between the denial of Respondent's request of transfer and the subsequent resignation without a previous hearing, and his affiliation with the NPP. Padilla García v. Rodríguez, at 77. In this context, a highly charged political atmosphere coupled with the fact that Respondent and Petitioners were of competing political persuasions was part of the proof of discriminatory animus. Id. at 75.

That is, the evidence presented to the District Judge at the summary judgment phase, and then accepted by the jury at trial, is that: (i) it was well known that Respondent Rivera Torres was a member of the NPP and a mayoral candidate against Petitioner Ortiz Vélez (who prevailed in being elected to that office); (ii) the election left serious conflict between the two opposed political partisan groups; and (iii) that the circumstantial evidence (validated by the jury) was that Respondent was a "conspicuous target."[12] These facts, and others determined by the jury on the basis of the evidence presented at trial, constitute basis of material,

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[12] In this regard, the evidence on the record is also that Petitioners requested from Respondent's physician his medical records, which were provided in early July 2000 -- contrary to Petitioners' allegation that the letter was "received" on October 31, 2000. In the meantime -- on September 20, 2000 -- Petitioner Ortiz Vélez (the Mayor) had publicly said, on a publicly-broadcasted radio program, that Respondent was being investigated for being a "crook", and about his "absenteeism"; and it was not until November 13, 2000 that the Mayor accepted Respondent's resignation (five months after the 15-day term provided by the controlling regulations). According to Petitioners at trial, that was the "shortest time possible," as stated in the letter by the Human Resources Director, denying Respondent's resignation on June 5, 2000. A review of the record will confirm the jury's understanding of these facts, and will show how every one of Petitioners' defenses in their Summary Judgment Motion and the Jury Trial backfired against them as untruthful.

factual, trial-worthy issues related to Petitioners' politically-discriminatory animus and conduct, and thus effectively barred summary judgment.[13] Padilla García v. Rodríguez, 212 F.3d 69, 75 (2000).

All of the above stated, coupled with the undeniable certainty of the standard applicable to the qualified immunity defense in regard to the reasonableness of the action taken by the officer, renders Petitioners' misinterpretation of Harlow v. Fitzgerald, 457 U.S. 800 (1982), a frivolous contention before this Court.[14] None of the excerpts of Crawford-El v.

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[13] In order to determine whether the factual dispute between the parties is "material", the substantive law will identify which facts meet that threshold. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Sheinkopf v. Stone, 927 F.2d 1259, 1262 (1st Cir. 1991); 10 A C. Wright, A. Miller & M. Kane, Federal Practice and Procedure & 2725 at 93-95 (1983). Certainly the facts in this case are of a nature that meets that threshold. Note also that, in some circumstances, pre-trial resolution will be impossible because of a dispute as to material facts. See Swain v. Spinney, 117 F.3d 1, 9-10 (1st Cir. 1997) (noting that the objective reasonableness inquiry is "highly fact specific"). In such a case, the factual issues must be decided by the trier of fact thereby precluding summary judgment. Id. Only after the facts have been settled can the court determine whether the actions were objectively reasonable so as to fall under the qualified immunity umbrella. Id.

[14] Petitioners support their assertion on a quite unique reading of well-settled case law on qualified immunity, which is at the same time the best support for the District Court's certification that their Forsyth appeal was frivolous. See 2 Sheldon H. Nahmod, Civil Rights and Civil Liberties Litigation: The Law of Section 1983, § 8:15, at 8-50 (4th ed. 20[illegible]

> "The reasoning and result in Crawford-El were sound. The Court wisely prevented qualified immunity from substantially undermining § 1983 constitutional claims based on impermissible motivation, including First Amendment, Eighth Amendment, due process and equal protection claims. Thus, Crawford-El did not work any great change in current case law. In contrast, the four dissenters would frankly have allowed the policy considerations underlying qualified immunity to eliminate many such claims. In their view, the cost of those violations were worth

Britton, 523 U.S. 574, 588-589 (1998), as offered by petitioners in their Petition support their interpretation whatsoever. Simply put, the Supreme Court in Crawford-El v. Britton, *supra,* explained its holding:

> "Our holding that 'bare allegations of malice' cannot overcome the qualified immunity defense did not implicate the elements of the plaintiff's initial burden of proving a constitutional violation. It is obvious, of course, that bare allegations of malice would not suffice to establish a constitutional claim. It is equally clear that an essential element of some constitutional claims is a charge that the defendant's conduct was improperly motivated. For example, A. Ernest Fitzgerald's constitutional claims against President Nixon and his aides were based on the theory that they had retaliated against him for speaking out on a matter of public concern.
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> Our consideration of the immunity issues in both the Nixon case and in Harlow itself assumed that Fitzgerald would be entitled to prevail but for the immunity defenses.
>
> Thus, although evidence of improper motive is irrelevant on the issue of qualified immunity, it may be an essential component of the plaintiff's affirmative case. Our holding in Harlow, which related only to the scope of an affirmative defense, provides no support for making any change in the nature of the plaintiff's burden of proving a constitutional violation."

Once their unique reading of Harlow v. Fitzgerald, 457 U.S. 800 (1982) is dissected in regard to the "motive" or

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bearing given the (to them) overwhelming costs of defending against such claims. In this light, Justice Scalia was particularly honest in expressing his general disapproval of § 1983 motive-based constitutional claims, while Chief Justice Rehnquist only hinted at his disapproval through his constant references to such claims as mere 'torts.'"

"discriminatory animus" element, it becomes clear that this argument for certiorari in this case is devoid of any legitimate grounds. As we have explained above, the First Circuit precedents, as well as of the Commonwealth of Puerto Rico, put a reasonable officer on notice that the delay in denying respondent's request of transfer and subsequent resignation without a previous hearing under the circumstances alleged by him was unlawful.[15]

III. RESPONSE TO PETITIONERS' CONTENTION ABOUT SUPREMACY OF PRECEDENTS REGARDING CLEARLY ESTABLISHED LAW AND TO DETERMINE WHETHER DEFERRED ACCEPTANCE OF RESIGNATION WOULD VIOLATE SUCH LAW

Petitioners' discussion in regard to this contention has been thoroughly analyzed by Respondents in Sections I and II, above. We respectfully pray this Honorable Court to accept the above-referred analysis with regard to this third section of the Petition, since Petitioners provide therein no

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[15] See also Practicing Law Institute, 7 LITIGATING SECTION 1983 ACTIONS IN STATE COURTS, PLI Order Number H0-00LA, November 13-14, 2003, at 42:

> "The Court in Crawford-El v. Britton, 118 S. Ct. 1584 (1998) recognized that even under Harlow and its progeny discovery on the issue of motive was not entirely foreclosed. These various protections may not entirely foreclose discovery on the issue of motive, and the Court of Appeals adopted its heightened proof standard in large part to facilitate the resolution of summary judgment motions before any discovery at all. Discovery involving public officials is indeed one of the evils that Harlow aimed to address, but neither that opinion nor subsequent decisions create immunity from all discoveries. Harlow sought to protect officials from the costs of "broad-reaching" discovery, and we have since recognized that limited discovery may sometimes be necessary before the district court can resolve a motion for summary judgment based on qualified immunity. Id., at 1594 n.14 (citations omitted)."

new grounds to support their contentions as to this third argument, other than, again, inaccurately stating that "[t]he case law of the district of Puerto Rico and the First Circuit does not shed any more light on this subject", which inexplicably ignores, as discussed above, the controlling holding in Nazario Acosta v. Estado Libre Asociado, 2003 TSPR 116, Judgment entered by the Supreme Court of Puerto Rico (without an Opinion) on June 30, 2003, *supra.* Petition, at 26-27.

IV. RESPONSE TO PETITIONERS' CONTENTION ABOUT SUPREMACY OF PRECEDENTS REGARDING THE VIOLATION OF CONSTITUTIONAL LAW AND TO DETERMINE WHETHER DEFERRED ACCEPTANCE OF RESIGNATION WOULD CONSTITUTE A MUNICIPAL LAW, POLICY OR CUSTOM

The petitioners' discussion in regard to this contention cursorily argues that the evidence in the instant case does not establish a direct causal link between a municipal policy or custom and the alleged constitutional deprivation. As to the applicable legal framework, the First Circuit Court's pronouncement in its August 26, 2003 Opinion was entirely correct. Accordingly, we pray this Honorable Court to accept, in addition to the following arguments, the above-referred analysis, since petitioners do not provide any new grounds to support their contentions. See Petition, at 68a-70a.

In essence, Petitioners argue that certiorari should be granted to ensure this Court's qualified immunity precedents by determining whether a Mayor's deferred acceptance of a public employee's letter of voluntary resignation pending a personnel resignation constitutes a municipal policy. There is

no need for this Court to undertake that measure, as the rulings below in no way deviate from this Court's commandments. Worse still, this argument is factually misleading, as the jury in this case established that Mayor Ortiz engaged in political discrimination under color of law.

First, Petitioners blatantly misrepresent the jury's finding. They claim in the Petition that "[t]he verdict rendered on December 9, 2002, imposed liability solely against Mayor Ortiz in his individual capacity." This is a misrepresentation that was explained by the District Court and the First Circuit Court of Appeals, but one that Petitioners insist in trying once again before this Court. A clear reading of the record shows that, in responding to Question No. 1 of the special verdict form, the jury found that "the actions of the defendant [Mayor Ortiz] were under the color of the authority of the state."

The confusion employed by Petitioners to mislead this Court is based on the fact that Question # 9 of the special verdict form inquired whether "the claimed unconstitutional conduct of the mayor as a higher authority was done pursuant to the policy of the municipality of Sabana Grande"; the jury responded to this question in the negative. However, the jury found in the affirmative Question No. 1 on that special verdict form, which asked the jurors to determine whether "the actions of the defendant were under the color of the authority of the state." The confusion stems from the fact that, initially limiting its focus to Question No. 9, the District Court erroneously remarked after hearing the verdict in its entirety that "According to [the special verdict form] the municipality did not have a policy. This thing was basically the mayor's thing. And I will then enter the appropriate judgment [in favor of the municipality]." The District Court then corrected its error by issuing a an order imposing liability as a matter of law, based on the jury's response to Question No. 1, and the First Circuit's decision

in Cordero v. De Jesus-Mendez, 867 F.2d 1 (1st Cir. 1989). Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 103-104 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 68a-69a. The First Circuit Court "aplaud[ed] prompt efforts to cure its initial error."[16] Id. at 69a-70a.

Secondly, the courts below followed this Court's rulings, and no error was committed. Contrary to Petitioners' position, the First Circuit Court below employed correctly its prior holding in Cordero, which implemented the Supreme Court's holding in Pembaur v. City of Cincinnati, 475 U.S. 469, 483-84 (1986) that "municipality liability under § 1983 attaches where ... a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." (Emphasis

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[16] The Circuit Court also noted that

> "Significantly, the jury's responses to Question # 1 and Question # 9 did not create an inconsistent verdict to be resolved in accordance with Rule 49 of the Federal Rules of Civil Procedure. Fed.R.Civ.P. 49. The jury's response to Question # 9 reflected its determination that the municipality had no freestanding laws or policies that allowed or encouraged the adverse employment decisions at issue. This determination was in no way inconsistent with its previous finding that the mayor, acting on his own initiative, discriminated against Rivera while discharging his duties as mayor. In the absence of a proper instruction, the jurors were unaware that Ortiz's actions as mayor were themselves the `policy' of the municipality. Given these circumstances, the district court's decision to disregard the jury's response to Question # 9 is in accord with our resolution of the identical problem in Cordero (cites omitted) and did not unfairly prejudice the municipality."

Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 96-98 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 70a. Petitioners' present this Court with no reason to review the lower courts' rulings.

added.). In Cordero, the First Circuit found held that a mayor in Puerto Rico is a government official ultimately responsible for the employment decisions of the municipality:

> "Under Puerto Rico law, one of the express powers given to mayors of municipalities is: `To appoint all the officials and employees of the municipal executive branch, and remove them from office whenever necessary for the good of the service, pursuant to the procedures provided herein.' P.R. Laws Ann. tit. 21, ch. 155 § 3002(15) (1980)."

Cordero, 867 F.2d at 7. Hence the conclusion reached by the Circuit Court is correct and unavoidable: "Mayor Ortiz's employment decisions in the context of this case ipso facto `constituted the official policy of the municipality." Id. Therefore, "the liability of the municipality could not be divorced from the mayor's liability in his official capacity. Because the jury expressly found in response to Question # 1 that `the [unlawful] actions of the defendant were under the color of the authority of the state,' municipal liability automatically attached." Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 96-98 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 69a.

Lastly, to support their argument (unsupported by the record evidence or the jury's findings) that the political discrimination was perpetrated by Mayor Ortiz in his official capacity does not impose municipal liability, Petitioner come to this Court with a barrage of factual arguments that are inconsistent with the jury's findings. Such factual arguments have no place before this High Court.

Furthermore, we refer to the compelling First Circuit Court's explanation of the folly of Petitioners' argument:

> "We reiterate that the municipality's contention that `[t]here is no evidence in the record, suggestive of the Mayor implementing any sort of municipal policy,' simply misses the point. Ortiz had the authority to control the conditions of Rivera's employment by virtue of being the Mayor of Sabana Grande. The employment decisions he made in that capacity constituted the policy of the municipality under well-established precedent. (Cites omitted.)

Rivera-Torres v. Ortiz Velez, 341 F.3d 86, 96-98 (1st Cir. 2003), provided in the Petition for Writ of Certiorari, at 70a. This finding by the First Circuit Court is perfectly consistent with Pembaur, 475 U.S. at 483; and Cordero, 867 F.2d at 7. To establish a policy as suggested by Petitioners -- that a municipal mayor can act in his official capacity to discriminate politically in violation of § 1983 without the municipality being liable as long as no formal, written municipal policy is established -- would allow such municipal-government officials to engage in illegal discrimination as long as no formal policy of discrimination is enunciated.

CONCLUSION AND PRAYER

For the reasons stated above, Respondents request the Court to deny Petitioners' Petition for a Writ of Certiorari.

RESPECTFULLY SUBMITTED, March 2, 2004.

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